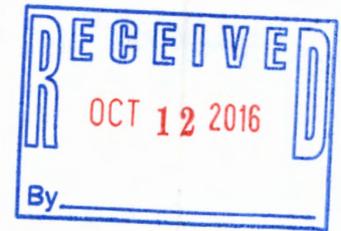




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460



OFFICE OF
CIVIL RIGHTS

October 5, 2016

Return Receipt Requested

Certified Mail#: 7009 2820 0002 1759 2152

In Reply Refer to:

EPA File No. 11R-14-R4

Sam M. Hayes
General Counsel
North Carolina Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1611

Dear Mr. Hayes,

Thank you for your letter dated September 2, 2016. Your letter requested that the Office of Civil Rights (OCR) confirm whether an impasse in the mediation has been declared. OCR's May 5, 2016 letter to Secretary van der Vaart stated that the ADR process between the North Carolina Department of Environmental Quality (NC DEQ) and the Complainants concluded without resolution. OCR's May 5 letter also stated that, consistent with our procedures, OCR had reinitiated its investigation.

Your letter requests that OCR dismiss the Complaint without prejudice. You raise a number of arguments to support this request. OCR has considered your proposals and the additional information included with your letter. For the reasons discussed below, OCR will continue its investigation of EPA File No. 11R-14-R4 (Complaint). OCR is investigating the following issues:

Whether the North Carolina [NC DEQ's] regulation of swine feeding operations discriminates against African Americans, Latinos, and Native Americans on the basis of race and national origin in neighboring communities and violates Title VI of the Civil Rights Act of 1964 and the Environmental Protection Agency's implementing regulations.

Whether NCDEQ's actions or inactions, including those associated with the presence and activities of the Pork Councils related to the January 2016 mediation session, violated 40 C.F.R § 7.100 which prohibits intimidating, threatening, coercing, or engaging in other discriminatory conduct against any individual or

group because of actions taken and/or participation in an action to secure rights protected by the non-discrimination statutes OCR enforces.

You first contend that OCR should dismiss the Complaint because it involves a matter that is currently the subject of ongoing litigation. In making this argument you rely upon OCR's Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("2000 Draft Guidance"), which states that "OCR will generally dismiss complaints without prejudice if the issues raised in the complaint are the subject of either ongoing administrative permit appeals or litigation in Federal or state court." The 2000 Draft Guidance explains that the outcome of such litigation could affect the circumstances surrounding the complaint and OCR's investigation. Your letter then refers to a number of cases where OCR elected to dismiss without prejudice cases where OCR had followed this policy.

As a threshold matter, please note that the current statement of OCR's case resolution procedures is the *Interim Case Resolution Manual* ("CRM"), (December 1, 2015 http://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf). The CRM provides updated guidance relevant to the Complaint. Section 3.4 of the CRM states that OCR may administratively close an investigation in light of pending litigation, including where "[t]he same civil rights allegations have been filed by the complainant against the same recipient with state or federal court individually or through a class action."

The ongoing federal litigation to which you refer in your letter, *In re: NC Swine Farm Nuisance Litigation*, 5:15-CV-00013-BR, and its related cases, *see, e.g., Anderson et al v. Murphy-Brown LLC*, concerns claims for nuisance, negligence, and punitive damages against the owners of the hog farming operations. The cases are not civil rights actions and were not filed against you, the recipient in this case. CRM Section 3.4 applies where the litigation involves the same recipient of EPA funds that is the focus of the administrative complaint. In addition, the ultimate resolution of *In re: NC Swine Farm Nuisance Litigation* and its related cases will not reach the merits of whether NC DEQ's regulation of swine feeding operations violates Title VI because the state's permitting program is not at issue. As such, the rationale for dismissing a claim – that the outcome of litigation could affect the circumstances surrounding the Complaint – is inapposite here. Moreover, the plaintiffs in *In re: NC Swine Farm Nuisance Litigation* and its related cases represent but a fraction of the protected class members who may be affected by NC DEQ's General Permit.

You further support your request for dismissal by pointing to OCR's "decreases policy" articulated in the 2000 Draft Guidance. Your letter contends that because NC DEQ has "strengthened" environmental protections regarding the renewed permit that is the subject of the Complaint, OCR should follow the 2000 Draft Guidance and dismiss this complaint. Under the 2000 Draft Guidance, however, OCR considers whether the revised permit "significantly decreases" the emissions or effects from emissions alleged in the Complaint. That does not appear to be shown here.

The Response to Comments document NC DEQ provided as Attachment A to its September 2, 2016 letter states that the "majority of the changes from the current permit are structural and

grammatical in nature.”¹ In response to comments opposing any changes making the permits more stringent or increasing regulatory requirements, NC DEQ stated that the “changes to the Permit language do not make the Permit more stringent, costly or burdensome.”² Additionally, in response to the comment that NC DEQ should address that African American communities disproportionately bear the impact of swine facilities, NC DEQ asserts that the 2014 General Permit does not cause additional impacts to communities.³ NC DEQ’s response did not state or explain how the 2014 Permit will reduce adverse impact from the source, significantly or otherwise.

Your letter also raised a concern that the Complainants did not pursue an administrative appeal of the General Permit. As you correctly pointed out, there is no requirement that Complainants exhaust administrative remedies before filing a discrimination complaint with OCR. Moreover, it appears that at the time the Complaint was filed with OCR, NC DEQ did not have in place a grievance process that recipients of EPA financial assistance are required to have under EPA’s Title VI implementing regulation. 40 C.F. R. § 7.90. This grievance process provides a specific avenue for groups and individuals, such as the Complainants, to raise their particular concerns about discrimination directly to NC DEQ.

Your letter also requested a proposed schedule for this investigation. As part of OCR’s established investigative process, OCR will contact you to set up an on-site visit to meet with NC DEQ staff to discuss the issues in this case. You indicated that NC DEQ would like to respond to the substance of the complaint. Please submit your written response to the substance of the complaint within 30 days of the date of this letter. OCR reserves the right to send NC DEQ a request for information in preparation for its on-site visit.

As previously communicated to NC DEQ, the EPA’s nondiscrimination regulation provides that OCR will attempt to resolve complaints informally whenever possible. 40 C.F.R. § 7.120(d)(2). Accordingly, OCR is willing to discuss, at any point during this investigation, offers to informally resolve the complaint through an Informal Resolution Agreement with OCR.

If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of Civil Rights (Mail Code 1201A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460-1000. Thank you in advance for your cooperation.

Sincerely,



Lilian S. Dorka
Acting Director
Office of Civil Rights

¹State of North Carolina, Department of Environmental and Natural Resources, *Report of the Proceedings on the Proposed Renewal of the State General Permits for Animal Feeding Operations, Public Meeting, November 12, 2013, Statesville, North Carolina, Public Meeting, November 14, 2013, Kenansville, North Carolina,* p. 4.

² Id., at pp. 5 & 8.

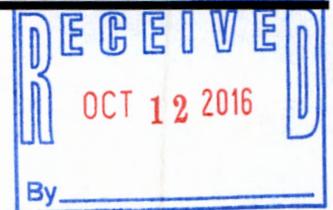
³ Id., at pp. 9-10.

cc Elise Packard
Associate General Counsel
EPA Civil Rights & Finance Law Office

Ken Lapierre
Assistant Regional Administrator
Deputy Civil Rights Official
U.S. EPA Region IV

Lewis, Judith

From: Stein, Jonathan
Sent: Tuesday, October 11, 2016 9:11 AM
To: Floyd-Coleman, Cynthia; Lewis, Judith
Cc: Temple, Kurt; Peterson, Samuel; Gottesman, Larry
Subject: FW: Request for Information (Earthjustice)
Attachments: Letter Mr. Sam Hayes re Request for Dismissal of 11R-14-R4.pdf
Importance: High



Good Morning,

Please assign the emails below from Earthjustice (Marianne Engelman Lado) a FOIA number and enter it into FOIA Online so that it can filter back through AO to OCR (please also include the attachment). As shown in the email chain below, they have made a request for information that we want to treat as a FOIA. Thanks!

Best Regards,

Jonathan M. Stein
Attorney Advisor
U.S. Environmental Protection Agency
Office of Civil Rights - External Compliance
1200 Pennsylvania Avenue, N.W. | Mailcode 1201A | Washington, DC 20460

202/564-2088 | Stein.Jonathan@epa.gov

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Please consider the environment before printing this email.

-----Original Message-----

From: Dorka, Lilian
Sent: Friday, October 07, 2016 6:51 PM
To: Stein, Jonathan <Stein.Jonathan@epa.gov>
Cc: Temple, Kurt <Temple.Kurt@epa.gov>; Covington, Jeryl <Covington.Jeryl@epa.gov>; Peterson, Samuel <Peterson.Samuel@epa.gov>
Subject: FW: Request for Information

Hi Jonathan, can you please help me get this into FOIA online and get a number assigned to it, etc? Thanks!

Lilian Sotolongo Dorka
Acting Director, EPA, Office of Civil Rights
202-564-9649
WJC-N Room 2450

-----Original Message-----

From: Dorka, Lilian

Sent: Friday, October 07, 2016 6:50 PM

To: 'Marianne Engelman Lado' <melado@me.com>

Cc: 'Elizabeth McLaughlin Haddix' <emclaugh@email.unc.edu>; 'Alexis Andiman' <aandiman@earthjustice.org>; 'Brent Ducharme' <ducharme@email.unc.edu>; O'Lone, Mary <olone.mary@epa.gov>; Farrell, Ericka <Farrell.Ericka@epa.gov>; Covington, Jeryl <Covington.Jeryl@epa.gov>; Isales, Daniel <Isales.Daniel@epa.gov>; Johnson, Johahna <Johnson.Johahna@epa.gov>; Rhodes, Julia <Rhodes.Julia@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>; Temple, Kurt <Temple.Kurt@epa.gov>

Subject: RE: Request for Information

Hello Marianne:

Attached, please find the response to your FOIA request below which consists of a copy of the letter issued on October 5, 2016 to NC DEQ's General Counsel. Please let me know if you have any questions.

Lilian

Lilian Sotolongo Dorka

Acting Director, EPA, Office of Civil Rights

202-564-9649

WJC-N Room 2450

-----Original Message-----

From: Dorka, Lilian

Sent: Thursday, October 06, 2016 10:45 PM

To: Marianne Engelman Lado <melado@me.com>

Cc: Elizabeth McLaughlin Haddix <emclaugh@email.unc.edu>; Alexis Andiman <aandiman@earthjustice.org>; Brent Ducharme <ducharme@email.unc.edu>; O'Lone, Mary <OLone.Mary@epa.gov>; Farrell, Ericka <Farrell.Ericka@epa.gov>; Covington, Jeryl <Covington.Jeryl@epa.gov>; Isales, Daniel <Isales.Daniel@epa.gov>; Johnson, Johahna <Johnson.Johahna@epa.gov>; Dorka, Lilian <Dorka.Lilian@epa.gov>

Subject: Re: Request for Information [WARNING: SPF validation failed]

Hi Marianne, I will treat this as a FOIA request and get back to w a response tomorrow. Please pass along to all how much we appreciated their traveling up to meet with us. Thx Lilian

Sent from my iPhone

> On Oct 6, 2016, at 10:32 PM, Marianne Engelman Lado <melado@me.com> wrote:

>

> Lilian,

>

> Thank you again for arranging the meeting yesterday.

>

> This email is intended as a quick follow up to the announcement that OCR has written a letter to the North Carolina Department of Environmental Quality (DEQ) in response to DEQ's request that OCR reconsider its jurisdictional decision in the REACH case. We hereby request a copy of the letter to DEQ. Please let me know if we need to submit a formal request under the Freedom of Information Act (FOIA).

>

> Many thanks,

- >
- > Marianne
- >
- > Marianne Engelman Lado
- > Senior Staff Attorney
- > Earthjustice 212 845-7393
- > mengelmanlado@earthjustice.org